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No. 91-949

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# In the Supreme Court of the United States

OCTOBER TERM, 1991

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HOLLAENDER MANUFACTURING CO., PETITIONER

*v.*

NATIONAL LABOR RELATIONS BOARD

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

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## BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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## QUESTION PRESENTED

Whether the National Labor Relations Board properly ordered petitioner to resume bargaining with the union as a remedy for petitioner's unlawful withdrawal of recognition from the union.

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### OPINIONS BELOW

The opinion of the court of appeals, Pet. App. 1a-17a, is reported at 942 F.2d 321. The opinion and order of the National Labor Relations Board, Pet. App. 18a-19a, and the decision of the administrative law judge, Pet. App. 20a-42a, are reported at 299 N.L.R.B. No. 59.

### JURISDICTION

The judgment of the court of appeals was entered on August 13, 1991. A petition for rehearing was denied on October 1, 1991. Pet. App. 43a. The petition for a writ of certiorari was filed on November

13, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. Petitioner is a corporation that manufactures and sells structural fittings and related products. Since December 13, 1965, Local Lodge 789, District Lodge 34 of the International Association of Machinists and Aerospace Workers, AFL-CIO (the Union), has been the certified bargaining representative of petitioner's production and maintenance employees. Pet. App. 20a-21a. Petitioner and the Union entered into a series of collective-bargaining agreements, the most recent of which expired on May 31, 1989. *Id.* at 22a. Prior to May 5, 1989, petitioner and the Union agreed to begin negotiations for a new contract on May 8, 1989. *Id.* at 24a.

On May 5, 1989, a bargaining-unit employee, Phyllis Dugger, circulated among her fellow unit employees a petition captioned, "DECERTIFICATION," and containing the following statement: "We the undersigned are rejecting Local Union [789]. We no longer want them to represent us, the [Hollaender] Manufacturing Inc., employee[s]." Pet. App. 25a. Dugger asked at least 23 of 30 nonprobationary employees, who were members of the Union and the bargaining unit, to sign the petition. Sixteen of the employees, including Dugger, signed. Dugger solicited the signatures in the presence of four probationary employees, but did not ask them to sign the petition. None of them volunteered to do so. *Ibid.*

Petitioner learned of Dugger's petition prior to the scheduled May 8 bargaining session. Operating on the premise that the four probationary employees did not count towards the number of bargaining unit

employees, petitioner advised the Union at the May 8 session that it was withdrawing recognition because 16 out of 30 unit employees had signed the petition. Petitioner also represented that it would no longer bargain with the Union. Pet. App. 26a.

On May 9, 1989, two of the probationary employees failed to report for work and did not return to petitioner's employ thereafter. The same day, at unspecified times, one employee removed his name from the decertification petition, and another employee added her name. Pet. App. 27a. At lunch time, petitioner circulated to its employees the following handout signed by its vice president:

> To all of the Hollaender Mfg. Co. shop employees:
>
> On Friday May 5, 1989, we received a petition signed by a majority of you stating that you no longer wanted the Machinists Union to represent you for the purpose of collective bargaining.
>
> Based on this employee sentiment, we informed the union at our first bargaining session on Monday, May 8, 1989 that we were now unwilling to enter into negotiations for a new labor agreement.
>
> We will, of course, continue to abide by the current union contract which expires on May 31, 1989. After that time, however, we will no longer recognize the Machinists Union as your bargaining representative.
>
> One immediate consequence of all of this is that effective June 1, 1989, we will no longer be deducting union dues of $20.15 per month from your pay check. Secondly, we will implement a new salary package for all of our machine shop employees which will be competitive with other similar companies in the Cincinnati metropolitan

area, and which also recognizes your past and current contributions to The Hollaender Mfg. Co.

YOU WILL NOT LOSE ANY OF THE SALARY AND FRINGE BENEFITS YOU CURRENTLY ENJOY.

We will provide further details concerning your salary and benefits in the next couple of weeks.

In the meantime, thanks for your continued patience and support.

*Id.* at 27a-28a.

2. The Union filed an unfair labor practice charge with the Board based on petitioner's withdrawal of recognition and refusal to bargain, and the Board's General Counsel issued a complaint. The ALJ concluded that petitioner had violated Sections 8(a)(1) and (5) of the National Labor Relations Act, 29 U.S.C. 158(a)(1) and (5), by withdrawing recognition from the Union. Pet. App. 34a. The ALJ found that the four probationary employees were part of the bargaining unit when the petition was signed on May 5 and when petitioner withdrew recognition from the Union on May 8. Because the 16 signatures collected on the petition therefore reflected a minority of 34 unit employees (30 nonprobationary and four probationary), the ALJ determined that petitioner lacked a reasonable and good faith doubt about the Union's majority status that justified petitioner's withdrawal of recognition. Pet. App. 30a-33a.

With respect to the remedy, petitioner contended that, even if it had violated the NLRA by withdrawing recognition of the Union on May 8, no bargaining order should issue because of subsequent events. Between May 8, 1989, and the hearing before the ALJ

on September 8, 1989, six of the unit employees who had failed to sign the petition left petitioner's employ, but all of the employees who had signed the petition remained with petitioner and no new unit employees were hired. Hence, petitioner claimed, at all times after May 8, 1989, half or more of the bargaining unit employees were employees who had signed the decertification petition. Pet. App. 36a.

The ALJ rejected petitioner's argument that she should base her remedial order on the events following petitioner's unlawful withdrawal of recognition. First, citing *Franks Bros. Co.* v. *NLRB*, 321 U.S. 702, 704-705 (1944), the ALJ observed that the unlawful refusal to bargain has an adverse effect on employee morale and discourages union membership. Pet. App. 36a. Second, the ALJ noted that petitioner's May 9 handout advising employees of its withdrawal of recognition explained that (a) monthly union dues of about $20 would no longer be withheld, (b) petitioner would now implement a competitive, new "salary package" recognizing each employee's "past and current contributions," and (c) no employee would lose any current salary or fringe benefits. *Id.* at 36a-37a. The ALJ was unable to presume that none of the employees who had signed the petition would have withdrawn his or her name if petitioner had offered the new package to the Union during the scheduled negotiations, rather than offering it as a consequence of petitioner's unlawful refusal to bargain. *Id.* at 37a.[1] The ALJ entered a proposed order directing petitioner to recognize and bargain with

[1] The ALJ noted that on May 9 an employee who had signed the petition withdrew his signature, but another employee added hers. Pet. App. 36a n.7. Thus, employee sentiment on the issue of union representation remained in flux.

the Union, *id.* at 39a-41a, and the Board affirmed, *id.* at 18a-19a.

3. The court of appeals enforced the Board's order. Pet. App. 1a-17a. The court agreed with the Board that petitioner lacked a reasonably grounded, good faith doubt concerning the Union's majority status when it withdrew recognition. *Id.* at 12a. In so holding, the court affirmed the finding that the four probationary employees were part of the bargaining unit. *Id.* at 13a-14a. The court also upheld the bargaining order adopted by the Board, reasoning that the Board acted within its broad remedial discretion by restoring the status quo as of the time petitioner unlawfully withdrew recognition of, and refused to bargain with, the Union. *Id.* at 16a-17a.

## ARGUMENT

Petitioner does not challenge in this Court the Board's finding that petitioner unlawfully withdrew recognition from the Union on May 8, 1989. Rather, petitioner claims only that the Board abused its discretion in issuing a bargaining order under the circumstances of this case. The court of appeals' decision enforcing the Board's order is consistent with the decisions of this Court and does not conflict with the decisions of any other court of appeals; review by this Court is unwarranted.

1. Petitioner contends that the Board acted unlawfully by issuing a bargaining order because, subsequent to petitioner's unlawful withdrawal of recognition of the Union, the Union lost its majority status through no fault of petitioner's. Pet. 10-15. That contention is foreclosed by *Franks Bros. Co.* v. *NLRB*, 321 U.S. 702 (1944), in which this Court recognized the Board's authority to issue a bargain-

ing order even though the union's majority had been eroded "in the normal course of business" before the remedial order was issued. *Id.* at 703. The Court reasoned that such an order was justified because an unlawful refusal to bargain "disrupts the employees' morale, deters their organizational activities, and discourages their membership in unions." *Id.* at 704. In addition, the Court explained, "a requirement that union membership be kept intact during delays incident to hearings would result in permitting employers to profit from their own wrongful refusal to bargain," perhaps giving them an incentive to delay proceedings before the Board. *Id.* at 704-705. Finally, the Court did not regard the bargaining order as unfair to those employees who might desire a different bargaining representative; the bargaining relationship established by such an order persists only for "a reasonable period in which it can be given a fair chance to succeed." *Id.* at 705.

Petitioner contends that *Franks Bros.* is inapposite because the dissipation of the Union's majority status in this case did not result from petitioner's unfair labor practice. Pet. 13-15. Even if petitioner's characterization of the reasons for the disproportionate departure of nonsigners of the petition were accurate,[2] it would not render *Franks Bros.* inapplicable here.

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[2] Petitioner asserts the employees who left petitioner's employ did so for reasons "unrelated to the withdrawal of recognition." Pet. 11. That assertion is without record support. None of the employees who left petitioner's employ after the withdrawal of recognition had signed the decertification petition; absent any indication to the contrary, it is plausible to infer that some of them may have been influenced by petitioner's unlawful elimination of the union representation that they had previously enjoyed.

Although the unfair labor practices in *Franks Bros.* involved aggressive acts calculated to dissipate employee support for the union, the issue before the Court was whether the Board properly issued a bargaining order after employees crucial to the union's majority were "replaced by new employees *in the normal course of business.*" 321 U.S. at 703 (emphasis added). Contrary to petitioner's argument, therefore, *Franks Bros.* decided the very issue in this case—whether the Board has authority to issue a bargaining order despite changed circumstances following an unlawful refusal to bargain.

Petitioner misplaces reliance, Pet. 7, 12-13, on *Garment Workers* v. *NLRB*, 366 U.S. 731 (1961), in which the Court found a violation of the NLRA where the employer recognized a union on the mistaken belief that the union enjoyed majority status. *Id.* at 738-740.[3] As petitioner concedes, Pet. 13, this

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[3] *Fall River Dyeing & Finishing Corp.* v. *NLRB*, 482 U.S. 27 (1987), upon which petitioner also heavily relies, Pet. 12, is similarly inapposite. In that case, the Court merely indicated that a successor employer violates the NLRA if it recognizes the union representing the predecessor employer's workers before the successor has employed a "substantial and representative complement" of those employees. 482 U.S. at 51 n.18. Petitioner's citation, Pet. 10, of *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575 (1969), is also misplaced; the *Gissel* Court recognized that "the Board has the * * * authority [to issue a bargaining order] even where it is clear that the union, which once had possession of cards from a majority of the employees, represents only a minority when the bargaining order is entered." *Id.* at 610 (citing *Franks Bros.*). And *NLRB* v. *Curtin Matheson Scientific, Inc.*, 494 U.S. 775 (1990), also cited by petitioner, Pet. 10, involved a substantive question regarding the presumption of a union's continuing majority status; *Curtin Matheson* has no bearing on the remedial question presented here.

Court has never extended *Garment Workers* to limit the Board's remedial discretion to issue a bargaining order following an employer's unlawful withdrawal of recognition from a duly certified union. Nor should it do so here. The NLRA's "overriding policy" of industrial peace is promoted by fostering stable bargaining relationships. *Fall River Dyeing & Finishing Corp.* v. *NLRB*, 482 U.S. 27, 38-39 (1987). In the present remedial context, the Board is properly vindicating a lawfully established—and presumptively continuing, *NLRB* v. *Burns International Security Services, Inc.*, 406 U.S. 272, 279 n.3 (1972)—bargaining relationship by permitting it to operate for a reasonable period after petitioner's unlawful withdrawal of recognition disrupted it.[4]

Petitioner also errs in maintaining, Pet. 11, that "there is no causal relationship" between its unfair labor practices and the Union's alleged subsequent loss of majority status. After petitioner withdrew recognition of the Union, it issued a notice informing all the employees of its action. That notice advised the employees that two consequences of petitioner's withdrawal of recognition were that petitioner (1) would no longer withhold monthly union dues of about $20, and (2) would implement a "new salary package" to be "competitive with other similar companies" and to recognize each employee's "past and current contributions." Pet. App. 28a. The notice also made clear that no employee would lose any cur-

[4] Petitioner wholly ignores that interest when it argues, Pet. 11, that the Board should have disregarded the Union's majority status as of May 8, 1989—when petitioner withdrew recognition of the Union—because at all times thereafter at least half of the remaining unit employees were signatories of the petition.

rent salary or fringe benefits because of the withdrawal of recognition of the Union. *Ibid.* Even after the withdrawal of recognition of the Union, employee sentiment remained somewhat in a state of flux. *Id.* at 36a n.7 (noting that on May 9, 1989, one employee added her name, and one substracted his name, from the petition). As the ALJ observed, "[i]t cannot be presumed that none of the petition-signers would have undergone a change of heart if, instead of promising employees 'a new salary package' (on expiration of the existing contract) as what [petitioner] termed a 'consequence' of [its] unlawful refusal to enter into negotiations for a successor contract, [petitioner] had offered the Union that same 'package' as part of such a contract." *Id.* at 37a. There is no basis for petitioner's naked assertion that its unlawful withdrawal of recognition bore no relationship to any manifestation of majority sentiment against representation by the Union after May 8, 1989.

2. Petitioner contends that the decision of the court of appeals conflicts with the decisions of three other courts of appeals. Pet. 15-18. The cases cited by petitioner do not support that contention.

In *Peoples Gas System, Inc.* v. *NLRB*, 629 F.2d 35 (D.C. Cir. 1980), "an extraordinary amount of time" —nearly five and a half years—had elapsed between the employer's initial refusal to bargain and the Board's issuance of a bargaining order. *Id.* at 47. In the interim, the union had filed a petition for a representation election, which it lost decisively in May 1975. *Id.* at 40. In holding that the Board had abused its discretion by issuing a bargaining order in that case, the court emphasized not only the "extraordinary delay" between the initial refusal to bargain and the formulation of the remedy, but also "the

clear, uncoerced expression" of employee sentiment reflected in the intervening election. *Id.* at 48. Neither consideration is present here.[5]

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[5] Contrary to petitioner's suggestion, Pet. 16, the District of Columbia Circuit's decision in *St. Agnes Medical Center* v. *NLRB*, 871 F.2d 137 (1989), is not inconsistent with the decision below. There, the Board issued a bargaining order after finding that the employer had engaged in various unfair labor practices during and after a decertification election. *Id.* at 141-143. The court vacated the Board's order and remanded for further consideration. First, the court disagreed with the ALJ's conclusion that the election had been tainted by massive employer violations of the NLRA; rather, it perceived "a decertification campaign that was vigorously contested by both sides, in the course of which the [employer] stepped over the line a number of times." *Id.* at 148. Particularly in view of its disallowance of certain of the ALJ's findings of unfair labor practices, the court directed the Board on remand to reassess the cumulative impact of the violations and consider whether they could be remedied by a rerun election. *Ibid.* Second, the Board had based its bargaining order in part on the employer's unilateral change in the terms and conditions of employment after the election. The court, however, vacated that predicate finding on the merits and remanded for the Board to reconsider whether, notwithstanding the unfair labor practice findings upheld by the court, the employer had a good faith doubt concerning the union's majority status when it made the changes. *Ibid.* Petitioner points to no grounds for questioning the factual predicates of the Board's remedial order in this case. While the court in *St. Agnes* also noted that the Board should have conducted a more detailed analysis of why a bargaining order (as opposed to a rerun election) was a necessary remedy, *id.* at 148-149, that observation does not bring *St. Agnes* into conflict with the present case. Here, the ALJ gave a careful explanation of how petitioner's withdrawal of recognition and proposed revision of the terms and conditions of employment made it impossible to rely on the petition as an accurate indicator of untainted employee sentiment regarding the Union. Pet. App. 36a-37a. The Board adopted that determination. *Id.* at 18a-19a.

Similarly, in *NLRB* v. *Laverdiere's Enterprises*, 933 F.2d 1045, 1054-1055 & n.8 (1st Cir. 1991), nearly three and a half years had passed between the ALJ's determination and the Board's decision, six years had elapsed between the refusal to bargain and the court's decision, and only 28 of the 70 affected unit employees remained in the work force. And in *Texas Petrochemicals Corp.* v. *NLRB*, 923 F.2d 398 (5th Cir. 1991), over four years had passed between the ALJ's determination and the Board's decision, the union had not represented the employees for over six years when the court rendered its decision, and, subsequent to the ALJ's decision in 1985, a majority of employees had expressed opposition to representation by the union. *Id.* at 404-405. No similar circumstances militating against the issuance of a bargaining order exist in this case.[6]

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[6] Here, the Board issued its order approximately 15 months after petitioner's unlawful refusal to bargain, and slightly more than seven months after the ALJ's decision. The court of appeals' decision was issued two years and three months after petitioner's unlawful action. There is nothing in the record to indicate a substantial change in the composition of the bargaining unit or a clear and untainted expression of employee sentiment against being represented by the Union.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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